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OFFICE OF ADMINISTRATIVE LAW

**STATE OF CALIFORNIA**  
**OFFICE OF ADMINISTRATIVE LAW**

In re: )  
Request for Regulatory ) 1998 OAL Determination No. 32  
Determination filed by )  
FREDERIC N. VON GLAHN ) [Docket No. 93-008]  
concerning the policy of the )  
DEPARTMENT OF ) Nov. 3, 1998  
CORRECTIONS, SIERRA )  
CONSERVATION CENTER, ) Determination Pursuant to  
Guidelines for Movie ) Government Code Section 11340.5;  
Screening Committee and ) Title 1, California Code of  
Movie Screening Committee ) Regulations, Chapter 1, Article 3  
Ballot <sup>1</sup> )  
\_\_\_\_\_ )

**Determination by: EDWARD G. HEIDIG, Director**

HERBERT F. BOLZ, Supervising Attorney  
CINDY PARKER, Administrative Law Judge  
on Special Assignment  
Regulatory Determinations Program

**SYNOPSIS**

The question presented to the Office of Administrative Law ("OAL") is whether the "*Guidelines For Movie Screening Committee*" and the "*Movie Screening Committee Ballot*" (hereinafter, jointly referred to as the guidelines) issued by the Department of Corrections ("Department"), through Sierra Conservation Center ("SCC"), constituted "regulations," which were void unless adopted pursuant to the Administrative Procedure Act ("APA"). The guidelines purported to establish

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criteria to assist in the consistent application of movie screening standards. These guidelines were in operation at SCC at the time of the request for determination in August, 1992. Four years later, in 1996, the Department promulgated regulations pursuant to the APA. The regulations were designed to restrict access by the inmate population only to those (1) movies/videos rated "G," "PG," "PG-13," and (2) movies/videos recommended by the institution movie screening committee and approved by the warden.

OAL has concluded that the challenged guidelines, which include both the Guidelines and the Ballot, were "regulations" within the meaning of the APA.

### **ISSUE**

The issue presented to the Office of Administrative Law ("OAL") is whether the guidelines that governed access by inmates at SCC to movies and videos which were more restricted than "G," "PG," or "PG-13" were "regulations" required to be adopted pursuant to the APA.<sup>2</sup>

### **ANALYSIS**

#### **I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?**

At the time the request for determination was filed, Penal Code section 5058, subdivision (a), declared in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations *shall be promulgated and filed pursuant to [the APA]*, and shall, to the extent practical, be stated in language that is easily understood by the general public." (Emphasis added.)

Clearly, the APA generally applies to the Department's quasi-legislative enactments.

Specifically, Penal Code section 10006 subdivision (b) provides:

“(b) The Department of Corrections, The Department of the Youth Authority, county juvenile halls and camps, the local adult detention facilities may promulgate regulations regarding the showing of tapes and movies at any institution or facility under their respective jurisdictions in order to provide for the reasonable security of the institution or facility in which a minor or adult is confined and for the reasonable protection of the public consistent with Section 2600.”

However, the APA would apply to the Department’s rulemaking even if Penal Code sections 5058 did not expressly so provide. The APA applies generally to state agencies in the executive branch of Government, as defined in Government Code section 11000 and as prescribed in Government Code section 11342, subdivision (a).

## **II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

The key provision of Government Code section 11342, subdivision (g), defines "regulation" as:

“... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . .” (Emphasis added.)

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

“(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has

been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]." (Emphasis added.)

In *Grier v. Kizer*,<sup>3</sup> the California Court of Appeal upheld OAL's two-part test<sup>4</sup> as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*."<sup>5</sup> (Emphasis added.)

### **Background of the Challenged Rule**

In 1944, Penal Code section 5058 was enacted. It provided: "The Director may prescribe rules and regulations for the administration of the prisons and may change them at his pleasure."

In 1975, Penal Code section 5058 was amended to require the Director to comply with the APA in promulgation of rules, with the exception that:

“ . . . (1) The director may specify an effective date that is any time more than 30 days after the rule or regulation is filed with the Secretary of State; provided that no less than 20 days prior to that effective date, copies of the rule or regulation shall be posted in conspicuous places throughout each institution and shall be mailed to all persons or organizations that request them.”

In 1988, in response to an inmate request for a regulatory determination regarding the Department's policy respecting inmate mail, the Department of Corrections represented to OAL that it: “. . . is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) *transferring all regulatory material from manuals to the CCR*, (2) combining all six existing manuals into a single more concise ‘Operations Manual,’ and (3) eliminating the duplicative material in the local ‘operations plans,’ while retaining in these plans material concerning unique local conditions.”<sup>6</sup>

In 1990, the Department's various manuals, including the Administrative Manual, were replaced by a nine-volume compendium entitled the Department Operations Manual (“DOM”). Inmate access to movies and videos was covered in DOM section 53070.3.8.

In 1991, in *Tooma v. Rowland*, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.<sup>7</sup> In this case, the Department had conceded that “much” of DOM violated the APA. The court found that “a substantial part” of the nine volume set was regulatory.

The Department responded to *Tooma* by issuing a bulletin stating that parts of DOM could not be used until adopted pursuant to the APA.

Administrative Bulletin Number 92/2, issued January 7, 1992, provided in part:<sup>8</sup>

“The purpose of this bulletin is to notify staff and inmates that the Department Operations Manual (DOM) is still in effect. However, as the

result of a recent court decision, some sections of DOM may not be used until they are processed pursuant to the Administrative Procedure Act (APA).

“Attached is a list of those DOM sections which the Department may use at this time. As the unlisted DOM sections are processed pursuant to the APA, they shall be added to the list and the updated list will be distributed. *It is anticipated that processing of all the unlisted DOM sections will be completed by June 1993.*

*“Until the unlisted DOM sections are processed, each institution and parole region shall independently implement local procedures in accordance with all applicable laws and regulations to govern those policies and procedures which are not covered by a listed DOM section.”* (Emphasis added.)

DOM Subsection 53070.3.8 (“Movies/Videos”) was not listed in the Administrative Bulletin. Therefore, it was deemed regulatory and invalid until adopted in compliance with the APA. Nevertheless, the Department authorized the wardens of individual institutions to screen movies and videos for inmate access. In its response to the request for determination, the Department advised:

“In 1992, the approval for showing commercial recreational movies/videos was delegated to the individual institutions. Each Warden was responsible for ensuring the movies/videos shown in his/her institution were appropriate. In the present case, the Warden established a movie screening committee to select which movies were appropriate to show at that institution.”<sup>9</sup>

In 1994, the Legislature enacted Penal Code section 10006. Subdivision (b) of that section authorizes the Department of Corrections, among others, to “. . . promulgate regulations regarding the showing of videotapes and movies at any institution or facility . . .”

In 1996, the Department promulgated California Code of Regulations, Title 15, section 3220.4 which codifies the Department’s rules on the issue.

## **This Request for Determination**

Frederic N. Von Glahn was an inmate at SCC on August 25, 1992, when he filed this request pursuant to Title 1, California Code of Regulations, section 122. Mr. Von Glahn asked OAL to determine whether the rules governing inmates' access to movie viewing were "regulations" required to be adopted in accordance with the APA. With his request, he included a copy of "Guidelines For Movie Screening Committee" and a copy of "Movie Screening Committee Ballot."

In its response, the Department contended the issue is moot because:

"[t]he local rule at issue has since been superseded by CCR [California Code of Regulations] section 3220.4 that has gone through the APA process, and [has been] approved by the Office of Administrative Law."<sup>10</sup>

OAL has consistently concluded, however, that subsequent laws or actions do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and the facts at the time the request was filed.<sup>11</sup>

Further, as indicated above, the Department contended that the guidelines are local rules of SCC.

### **A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"**

The issue presented is whether the challenged policy is a "local rule," which is not subject to the APA because it does not constitute a standard of general application.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>12</sup>

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between: (1) statewide rules and (2) rules applying solely to one prison.<sup>13</sup> In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),<sup>14</sup> a case which overturned a trial court

order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are *distinguished from* the *institutional rules* enacted by each warden of the particular institution affected." (Emphasis added.)<sup>15</sup>

*Procunier* is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "promulgated by the Director" (emphasis added), were subject to APA requirements. The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden . . . ."

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

(1) *Rules* issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the

Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public ."  
[Emphasis added.]

In determining whether a "local rule" of the Department of Corrections is a standard of general application, OAL determines whether the rule, though officially designated as addressing a matter of only local concern, in reality addresses an issue of statewide importance.

Being labeled a "local rule" by the issuing agency is not dispositive. Whether a state agency rule constitutes a standard of general application does not depend solely on the official designation of the agency action. According to the California Court of Appeal:

"[i]f the action is *not only of local concern, but of statewide importance*, it qualifies as a regulation despite the fact it is called 'resolutions,' 'guidelines,' 'rulings' and the like."<sup>16</sup>

One indication of whether a particular matter should be deemed to be "of statewide importance" is whether the Department, *itself*, considered the matter of statewide importance by issuing pertinent *statewide* rules, in the California Code of Regulations, the DOM, another manual such as the Administrative Manual, or an administrative bulletin.

With regard to the rules challenged in this regulatory determination, it is apparent that the director and the Department previously considered the screening of movies and videos which are appropriate for inmate viewing to be of statewide importance. Thus, section 53070.3.8. of the DOM addressed the purpose and criteria of the movie/video screening policy.

As noted above, under "Background of the Challenged Rule," following the 1991 judicial decision striking down all regulatory portions of the DOM, the Department instructed individual institutions to "implement local procedures" on the topics covered in the invalidated DOM provisions. Thus, it was only after the DOM provision was invalidated following the *Tooma* case, that the Department

delegated to local institutions the responsibility of creating guidelines and criteria for screening. Indeed, the policy in place at SCC very closely reflects the purpose and criteria of the invalidated DOM provision. DOM section 53070.3.8 provided as follows:

“Movies and/or video tapes shall be selected and scheduled for viewing on a quarterly basis. This schedule shall be submitted to the appropriate administrator for final approval prior to the beginning of each quarter.

“Films glorifying violence, sex (x-rated) or considered inflammatory to the climate of the institution shall not be scheduled.

“Inmate committees may be utilized in assisting the supervisor of recreation in the selection and scheduling of movies/videos.”

In response to the Administration Bulletin 92/2 invalidation of the “Movies/Videos” statewide DOM provision, the Warden at SCC instituted the guidelines provided below:

### **“Movie Screening Committee Ballot”**

“COMMITTEE MEMBER: \_\_\_\_\_ DATE: \_\_\_\_\_  
VIDEO TITLE: \_\_\_\_\_

\_\_\_\_\_ No X-rated movies.

\_\_\_\_\_ Movie is exploitative in any of the following categories, and/or glorifies any of the following:

\_\_\_\_\_ Mutilation, decapitation, graphic cannibalism.

\_\_\_\_\_ Sadistic violence, torture (humans or animals.)

\_\_\_\_\_ Abusive violence, either physical or mental, directed toward women or children in such a manner as to appear that it is appropriate to abuse women and/or children.

\_\_\_\_\_ Inflammatory to the climate of the institution, whether with or without redeeming merit as a movie. Movies which contain inflammatory, “racist” or “gang” themes. Examples: “Colors,” “Mississippi Burning,” and “Betrayed.”

\_\_\_\_\_ Depicts implicit or explicit rape, bondage sex, unnatural sex, or group sex.”

### **“Guidelines For Movie Screening Committee”**

“The depicting of a single scene or several scenes may not warrant the automatic exclusion of a film, if, in the film’s context, the scene serves to make a larger moral or ethical point. Specifically a movie which showed child abuse to make the larger point that it is morally wrong and that it is a disease requiring help, etc., would be acceptable.

“However, movies often ‘pretend’ to make moral points, while doing so in an exploitative manner. Repeated scenes, particularly if of a sexual nature, are a clue that it is an exploitative film.

“The criteria listed above should assist you in the consistent application of movie screening standards. Remember, it is not your standards which you apply but the institution’s. If you believe that you cannot in good conscience apply those standards then it is your responsibility to inform your supervisor of that fact, so that you may be replaced. It is no reflection upon you; however, it is an operational necessity.”

Further, the regulation later adopted pursuant to the APA, again, very closely resembles the guidelines used by SCC. In 1996, the Department promulgated the statewide regulation pertaining to screening movies and videos in California Code of Regulations, Title 15, section 3220.4, which is quoted in endnote 17.<sup>17</sup>

The standards and criteria set out, in Title 15, section 3220.4 of the CCR, apply statewide. Depending on the custody classification of particular institutions, or the circumstances prevailing in different prisons, the criteria may be applied to accommodate the needs of each. Nevertheless, the criteria remain the same statewide. How they are applied may differ from institution to institution. Because the DOM criteria applied to all institutions, the challenged policy in place at SCC, which reflected the invalidated DOM provision, addressed an issue of statewide importance.

An additional ground for determining application of the “local rule” exception is the existence of circumstances *unique* to the institution at issue. The Department’s position essentially is that the SCC guidelines cannot reflect a standard of general application because they address “*unique*” circumstances at SCC and do not apply statewide to all prisoners. The Department developed this argument at length in its agency response in 1988 OAL Determination No. 13, which concerned so-called “local rules” of the California Medical Facility (“CMF”). In the CMF matter, the Department argued that “[t]he issue now to be

decided is whether certain operational procedures *unique* [to] CMF are rules of ‘general application.’ ” (Emphasis added.)<sup>18, 19</sup>

OAL agrees that certain “local rules” concern matters *unique* to particular prisons, and that these “unique” matters should not be deemed to constitute rules of “general” application for reasons stated in 1988 OAL Determination No. 13. For an example of a unique local rule, OAL turns to the San Quentin prison library rule cited by a 1970 California Supreme Court case:

“[Rule] 14. At maximum capacity, we can only accommodate 50 men at one time; after this amount the rule is ‘ONE MAN IN, AND ONE MAN OUT!’ ”<sup>20</sup>

The local rule quoted above responded to “practical limitations of space,”<sup>21</sup> i.e., unique circumstances at San Quentin involving the size of the room housing the library.

In the present case, the warden’s rules at SCC do not reflect particular circumstances “unique” to SCC, circumstances which differ substantially from those at other institutions.

The agency response states:

“[t]he Department contends that the ‘climate’ of each institution is unique and may change at any given time. Even though a movie/video has been placed on the ‘statewide discretionary list,’ or has received an MPAA rating of ‘G,’ ‘PG,’ or ‘PG-13,’ it serves a legitimate penological interest to keep the final decision as to whether or not a movie will be shown with the institution head or his/her designee.”<sup>22</sup>

This argument makes a reasonable point, but this does not bear on the legal issue of the validity under the APA of the *generic* movie guidelines currently under review. The Department does not point to any specific part of the challenged guidelines as representing a response to a *unique* SCC condition. However, OAL recognizes that duly adopted statewide guidelines may well need to be applied in different ways at different institutions, reflecting unique local conditions. It might

even be possible to demonstrate that particular, documented unique conditions at a particular institution supported issuance of a local rule supplementing duly adopted statewide movie guidelines.<sup>23</sup>

The Department would argue that the specific challenged rules are not subject to the APA because they represent departmental responses to unique local conditions. A factual description of the unique local conditions, as well as an explanation of how the challenged rule addresses the unique conditions, is needed to give definition to institutional policies which the Department would exempt from the APA under the "local rule" exception.

Without any factual support for the Department's position that the import of the challenged rules was limited to the unique circumstances of Sierra Conservation Center, and in light of the fact that the rules involve a topic covered by statewide DOM provisions and later the California Code of Regulations, it is apparent that this rule is not only of local concern but of statewide importance. Therefore, the challenged SCC rules regarding the screening of appropriate movies and videos at that institution are standards of general application.

**B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?**

Penal Code section 5058, subdivision (a), declares that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons . . . ."

Penal Code section 5054 provides that:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections] . . . ."

Penal Code section 10006, subdivision (b), adopted in 1996, provides:

“The Department of Corrections, The Department of the Youth Authority, county juvenile halls and camps, the local adult detention facilities may promulgate regulations regarding the showing of tapes and movies at any institution or facility under their respective jurisdictions in order to provide for the reasonable security of the institution or facility in which a minor or adult is confined and for the reasonable protection of the public consistent with Section 2600.”

Setting limits upon the movies and videos appropriate for inmate viewing clearly implements, interprets, and makes specific the laws enforced or administered by the Department.

Thus, the challenged guidelines not only constitute a standard of general application, they also implement, interpret, and make specific the laws enforced by the Department. Both elements of the two-part test have been satisfied. *OAL concludes the challenged guidelines constitute “regulations” within the meaning of Government Code section 11342.*

### **C. IS THE ISSUE MOOT?**

OAL has found previously,<sup>24</sup> that subsequent laws or actions (e.g., rescission of the policy) by an agency do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and facts at the time the request was filed.

Therefore, even though the Department has subsequently promulgated its rules regarding movie and video screening pursuant to the APA, it does not render this request for determination moot.

### **III. DOES THE CHALLENGED RULE FALL WITHIN ANY *SPECIAL*<sup>25</sup> EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?**

After this request was filed, the Department’s enabling act was amended to include several express exemptions from APA rulemaking requirements, including Penal Code section 5058, subdivision (c),<sup>26</sup> quoted in Section II.B. of this

determination. OAL is obliged to consider both the state of the law at the time the request was filed, and the state of the law as of the date this determination is issued.<sup>27</sup>

Penal Code section 5058, subdivision (c), added in 1995, provides that rules applying solely to a particular prison are not subject to the APA provided that *all* rules which apply to prisons throughout the state are adopted pursuant to the APA. Essentially, section 5058, subdivision (c), advises the Department of the need to abide by the APA as one of two conditions to the use of the "local rule exception."

OAL has already concluded that the movie and video guidelines were not local rules under pre-1995 law. For the reasons set forth in Section II.B. of this determination, OAL further concludes that the disposition guidelines do not fall within the local rule exception of Penal Code section 5058.

However, as noted above, several years after the request for determination was filed, the Department adopted its rules regarding movie and video screening pursuant to the APA. Thus, at this point in time, Title 15, section 3220.4 of the California Code of Regulations validly regulates the screening of movies and videos which are appropriate for inmate viewing.

#### **IV. DOES THE CHALLENGED RULE FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?**

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>28</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>29</sup>

#### **INTERNAL MANAGEMENT**

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court stated:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*' [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][<sup>30</sup>]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison

population' in its custody. . . .

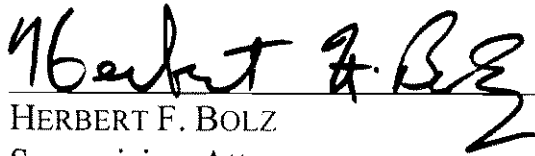
"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not *per se* fall within the internal management exception. . . ."31

The challenged rule is a rule of general application which significantly affects the ability of the entire prison population in California, both male and female, to view movies and videos of their choice. Therefore, the internal management exception does not apply. The challenged rule does not fall within any general express statutory exemption from the APA. OAL concludes that the rule challenged in 1992 regarding the screening of movies and videos was without legal effect since it had not been adopted in compliance with the APA. At the time of this regulatory determination, however, Title 15, section 3220.4 of the California Code of Regulations validly regulates the screening of appropriate movies and videos in California's prisons.

## CONCLUSION

For the reasons set forth above, OAL concludes that the challenged policy in place at Sierra Conservation Center in 1992 which covered the screening of movies and videos for distribution to inmates was a "regulation." Therefore, it was invalid until adopted pursuant to the APA. The regulation was so promulgated in 1996. Therefore, as of the date this regulatory determination is issued, the Department's regulation on this topic is valid.

DATE: November 3, 1998

  
HERBERT F. BOLZ

Supervising Attorney

*for*   
CINDY PARKER

Administrative Law Judge

on Special Assignment

Regulatory Determinations Program

**Office of Administrative Law**

555 Capitol Mall, Suite 1290

Sacramento, California 95814

(916) 323-6225, CALNET 8-473-6225

Telecopier No. (916) 323-6826

Electronic mail: [staff@oal.ca.gov](mailto:staff@oal.ca.gov)

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## ENDNOTES

1. This request for determination was brought by Mr. Frederic N. Von Glahn, "requester," P.O. Box 617, Jamestown, CA 95327. The State Department of Corrections was represented by Pamela L. Smith-Steward, Deputy Director, Legal Affairs Division. Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001.

On August 7, 1998. OAL published a summary of this Request for Determination in the California Regulatory Notice Register ("CRNR") 98, No. 32-Z, p. 1510, along with a notice inviting public comment. No public comments were received. The Department of Corrections filed a response to the request for determination.

2. According to Government Code section 11370:

*"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act."* [Emphasis added.]

*OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.*

3. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

*Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

4. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op., at p. 8.)"

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published after *Grier*, in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

5. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
6. 1988 OAL Determination No. 13, note 23, CRNR 88, 38-Z, Sep. 18, 1988, p. 2957, note 23.
7. *Tooma v. Rowland* (Sep. 9, 1991) California Court of Appeal, Fifth Appellate District, FO15383 (granting writ of mandate ordering Director of Corrections "to cease enforcement of those portions of the Department Operations Manual that require compliance with the Administrative Procedure Act pending proof of satisfactory compliance with the provisions of the Act," typed opinion, pp. 3-4).

Although *Tooma* is an unpublished opinion of a court of appeal, OAL may refer to it for guidance because Rule 977 of the California Rules of Court does not apply to determinations by OAL. Rule 977 prohibits *a court or a party* from citing or relying upon an unpublished opinion of a court of appeal and applies to actions or proceedings *in a court of justice* (Code of Civil Procedure, sections 21 and 22).

8. A copy of this Administrative Bulletin is attached to the Agency response filed in **1998 OAL Determination 23**. The Bulletin is signed by the Chief Deputy Director of CDC.
9. Department of Corrections response to the request for determination, dated August 21, 1988, page 1.

10. Department of Corrections' Response to Request for Determination, page 2, dated August 21, 1998.
11. **1991 OAL Determination No. 4**, p.85 (Department of Corrections, April 1, 1991. Docket No. 90-006). CRNR 91, No. 27-Z, July 5, 1991, p. 910, concluded that subsequent laws or actions (e.g., rescission of the policy) by the agency do not alter the obligation of OAL under its own regulations (Title 1, CCR, sections 123 & 126) to issue a determination based upon the law and facts at the time the request was filed.

As any other state agency, OAL is bound to follow its own regulations. See *Memorial, Inc. V. Harris* ( 9th Cir.1980) 655 F.2d 905, 910, n.14.

12. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
13. See *In re Allison* (1967) 66 Cal.2d 282, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections *and* of the particular institution. . . .") (Emphasis added.)
14. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
15. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
16. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
17. **"Movies/Videos for Inmate Viewing**

"(a) Only movies/videos approved by the institution head or his/her designee (reviewer) may be scheduled for viewing by inmates.

"(b) Only those movies/videos which have been given a rating of "G," "PG," or "PG-13" by the Motion Picture Association of America (MPAA) or that have been placed on the department's discretionary showing list may be considered for viewing. Movies/videos which have been given a rating of "G," "PG," or "PG-13" by the

Motion Picture Association of America shall not be approved for general inmate viewing. Regardless of their rating or listing, movies/videos which, in the opinion of the reviewer, glorify violence or sex, or are inflammatory to the climate of the facility shall not be shown.

“(c) The selection or exclusion of a movie/video by a facility may be challenged by members of the public by writing to the director, appealed by inmates by following the appeal process as stated in section 3084.1 et seq., and grieved by staff by pursuing grievance procedures in accordance with their collective bargaining unit’s contract and/or memorandum of understanding.

“(d) At the discretion of the director, a movie/video review shall be done by the movie review committee, composed of staff named by the director. Movies may be submitted for consideration as follows:

“(1) Movies/videos which have not been rated may be submitted to the director for the committee’s consideration for general inmate viewing.

“(2) Movies/videos which have an MPAA rating of other than “G,” “PG,” or “PG-13,” or have not been rated by the MPAA, may be submitted to the director by the facility reviewer or a contract vendor for the committee’s consideration for specified limited inmate viewing purposes ( e.g., education or contracted service vendor programs).

“(3) Movies which are challenged by the public, appealed by inmates, and grieved by staff pursuant to subsection (c) of this section shall be reviewed by the committee at the director’s discretion.

“(e) The committee may determine a movie/video to be unacceptable for inmate viewing, acceptable for general inmate viewing, or acceptable for specified limited inmate viewing purposes.

“(f) The committee will place movies/videos on a statewide “discretionary showing list” under the category of “approved for all purposes,” or under the category of “approved for specified limited inmate viewing purposes” (specifying the limited or special purpose for which the movie is being approved), or under the category of “unacceptable for inmate viewing.” A movie/video’s placement on the list as approved will not require that it be shown by a facility.” (15 CCR section 3220.4.)

19. See also 1988 OAL Determination No. 13, p. 14 (quoting agency response to the effect that CMF rules were needed to “meet the *unique* situation at CMF.”)(Emphasis added.) CRNR 88, 38-Z. Sep. 18. 1988, p. 2957.
20. *In re Harrell* (1970) 2 Cal.3d 675, 695 n. 16, 87 Cal.Rptr. 504, 516 n. 16.
21. *Id.*, p. 516.
22. Department’s response, pages 1 and 2.
23. Statutory and regulatory authority exists for addressing changed “climate” in emergency situations. Penal Code section 2086 provides: “The wardens may make temporary rules and regulations, *in case of emergency*, to remain in force until the department otherwise provides.” (Emphasis added.) See Penal Code section 5058, subdivision (d)(2) (APA exemption covering policies needed to deal with imminent danger, involving compelling need for immediate action, without which serious injury, illness, or death is likely); and Penal Code section 5058, subdivision (e) (waiving regular statutory requirements for demonstrating that “emergency” exists; Director of Corrections need only certify that operational needs of Department require adoption of regulations on emergency basis).
24. **1991 OAL Determination No. 4**, p. 85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910; *Memorial, Inc. v. Harris* (9th Cir. 1980) 655 F.2d 905, 910, n. 14. *Also see* Title 1, CCR, section 126. OAL must respond to the request pursuant to its own regulations.
25. All state agency “regulations” are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections’ pilot programs under specified conditions, typically: (1) apply only to a portion of one agency’s “regulations” and (2) are found in that agency’s enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.
26. See endnote 4.
27. **1998 OAL Determination No. 7** (Department of Social Services, Docket No. 91-001, June 18, 1998), typewritten version, p. 9, California Regulatory Notice Register 98, No.

30-Z, July 24, 1998, p. 1400.

28. Government Code section 11346.
29. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
  - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
  - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
  - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
  - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.
30. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
31. (1990) 219 Cal.App.3d 422 436, 268 Cal Rptr. 244, 252-253.